No. 18896

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN KASSAB,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

BRIEF FOR RESPONDENT.

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Jurisdiction.

On September 15, 1963 petitioner filed in this Court's Petition For Review of Deportation Order praying that the deportation order against her be vacated and set aside and that she be granted all proper relief. The deportation order against petitioner is a final order of deportation issued pursuant to Section 242(b) of the Immigration and Nationality Act; and this Court has jurisdiction to review such an order under the provisions of Section 106(a) of that Act, as added by Public Law 87-301, 75 Stat. 651, 8 U. S. C. A. Section 1105a(a). However, it may at least be questioned whether petitioner's challenge to her deportation order is bona fide, or whether instead her only real complaint is against the underlying administrative deter-

mination rescinding her adjustment of status pursuant to Section 246(a) of the Immigration and Nationality Act. In the latter event, some doubt as to the jurisdiction of this court to review either the rescission proceedings or the deportation proceedings may exist.

The decisions of the Seventh Circuit would undoubtedly lead to the conclusion that this Court has original jurisdiction under Section 106(a) to review rescission proceedings under Section 246(a) where, as here, deportation is dependent upon rescission [*Blagaic v. Flagg,* 304 F. 2d 623 (7th Cir. 1962); *Roumeliotis v. Immigration and Naturalization Service,* 304 F. 2d 453 (7th Cir. 1962), cert. den. 371 U. S. 921]. Prior decisions of this Court, however, might lead to a different result [*Cf. Arreche-Barcelona v. Immigration and Naturalization Service,* 310 F. 2d 690 (9th Cir. 1962); *Holz v. Immigration and Naturalization Service,* 309 F. 2d 452 (9th Cir. 1962)]. The Supreme Court of the United States, in the recent decision of *Foti v. Immigration and Naturalization Service,* ..... U. S. ..... [32 L. W. 4049, Dec. 16, 1963], indicated a preference for the broad interpretation of Section 106(a) adopted by the Seventh Circuit; although the facts of the *Foti* decision do not control the case at bar.

If petitioner has made a bona fide challenge to the deportation order itself, jurisdiction to review the collateral determination rescinding her adjustment of status might also be sustained under the doctrine of pendent jurisdiction [*Cf. Romero v. International Terminal Op-*

erating Co., 358 U. S. 354, 380-381 (1950); *Hurn v. Oursler,* 289 U. S. 238 (1933); *Taussig v. Wellington Fund, Inc.,* 313 F. 2d 472 (3d Cir. 1963)]. In *Lefson v. Esperdy,* 211 F. Supp. 769 (S.D. N.Y. 1962), where plaintiff sought judicial review of both an order of deportation and a denial of her application for adjustment of status to that of a permanent resident, the district court, applying the concept of pendent jurisdiction, transferred the entire case to the Court of Appeals pursuant to Public Law 87-301. And in *Ungo v. Beechie,* 311 F. 2d 905 (9th Cir. 1963), cert. den. 373 U. S. 911, this Court reviewed, under Section 106 of the Immigration and Nationality Act, both the adjudication of deportability and the denial of discretionary relief under Section 212(c) of the Act.[1]

Moreover, the order rescinding petitioner's adjustment of status became a part of, and was in effect swallowed up by, her deportation proceedings. Review of the rescission order may therefore be justified by analogy to the provisions of Section 10(c) of the Administrative Procedure Act, 5 U. S. C. A. § 1009(c), which provides in part:

> "* * * Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *"

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[1]In *Ungo v .Beechie, supra,* the original jurisdiction of this Court to review the denial of discretionary relief was challenged for the first time when petitioner sought certiorari [See 31 L. W. 3367]. In opposing certiorari the Government advanced the doctrine of pendent jurisdiction.

Acceptance of jurisdiction by this Court to review all issues presented herein would be consonant with the Congressional purposes underlying Section 106 "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States," to preclude exploitation of the judicial process for purposes of delay, and to avoid repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings [See, House Report 1086, 87th Cong., 1st Sess. 1961, U. S. Code Congressional and Administrative News, pp. 2960-2970; see also, *Foti v. Immigration and Naturalization Service, supra,* at 32 L. W. 4052].

Statement of the Case.

Petitioner is an alien, a native of Iraq and a citizen of Israel [I-R. 79, 55].[2] She was admitted to the United States on or about July 23, 1958 at New York, New York, in the temporary status of a nonimmigrant going in transit through the United States to Mexico [I-R. 79, 80, 56].

On August 26, 1958 petitioner filed an application for status as a permanent resident under Section 245 of the Immigration and Nationality Act, basing her eligibility

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[2]The record in this case consists of two volumes. The first volume contains the deportation proceedings relating to petitioner, and its pages have been numbered consecutively from 1 through 101. Reference to page number of this volume will be indicated "I-R." The second volume contains the rescission proceedings relating to petitioner, except for that portion of the rescission proceedings contained in the deportation record. The pages of the second volume have been numbered consecutively from 1 through 38; and references to these pages will be indicated "II-R." References to Petitioner's Opening Brief will be indicated "Br."

for a preference quota status upon the claim that she was a registered nurse [II-R. 36, item 36]. On September 5, 1958 Charles Brent submitted a visa petition on behalf of petitioner, in which he also stated that she was a registered nurse [II-R. 37, item 5]. On September 16, 1958 the District Director approved said visa petition to accord petitioner a first preference status under Section 203(a) (1) (A) of the Immigration and Nationality Act [II-R. 36, 38]; and on November 12, 1958 petitioner's status was adjusted to that of a permanent resident of the United States [I-R. 8, 56].

On March 13, 1962 the District Director, after notice and hearing, ordered that the status of permanent residence granted to petitioner on November 12, 1958 be rescinded, finding that petitioner had failed to overcome the evidence compiled against her that she was not a registered nurse, and concluding that petitioner was not entitled to a first preference classification and was not eligible for the adjustment of status granted her on November 12, 1958 [I-R. 85]. On May 7, 1962 this decision of the District Director was affirmed on appeal by the Regional Commissioner [I-R. 89-90]; and by letter dated May 16, 1962 the District Director sent petitioner a copy of the Regional Commissioner's decision and informed her, among other things, that "There is no further appeal available to you."

On March 25, 1963 an Order To Show Cause and Notice of Hearing was issued by the Immigration and Naturalization Service charging that petitioner was sub-

ject to deportation pursuant to the following provisions of law [I-R. 79]:

> "Section 241 (a) (2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101 (a) (15) of said act you have remained in the United States for a longer time than permitted."

Pursuant to the aforementioned Order To Show Cause a deportation hearing was held at Los Angeles, California on April 1, 1963, April 18, 1963, and April 23, 1963 [I-R. 48-78]. At this hearing petitioner sought to present evidence tending to show that the determination rescinding her adjustment of status was in error; however, the special inquiry officer sustained an objection to this evidence, ruling that he had no authority to go behind the decision made in the rescission proceedings [I-R. 74, 45].

On April 23, 1963 the special inquiry officer who presided at petitioner's deportation hearing rendered his oral decision [I-R. 44-47, 77], ordering that petitioner be deported from the United States to Israel on the charge contained in the Order To Show Cause [I-R. 47]. Petitioner appealed the decision of the special inquiry officer to the Board of Immigration Appeals; and on August 16, 1963 the latter Board rendered its decision [I-R. 3-5], ordering petitioner's appeal dismissed [I-R. 5].

Issues Presented.

1. Did the special inquiry officer err in refusing to allow petitioner to challenge, during her deportation hearing, the determination rescinding her adjustment of status?

2. Was the information given petitioner, that no further appeal was available, erroneous?

3. If the information given petitioner, that no further appeal was available, was erroneous, was it also prejudicial?

4. Is the order rescinding petitioner's adjustment of status supported by sufficient evidence?

Statutes Involved.

1. Section 245 of the Immigration and Nationality Act, 8 U. S. C. A. §1255, provided in part on November 12, 1958 when petitioner's status was adjusted to that of a permanent resident:

> "SEC. 245. (a) The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, (3) an immigrant visa was immediately available to him at the time of his application, and (4) an immigrant visa is immediately available to him at the time his application is approved. A quota immigrant visa shall be con-

sidered immediately available for the purposes of this subsection only if the portion of the quota to which the alien is chargeable is under-subscribed by applicants registered on a consular waiting list.

"(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year current at the time such adjustment is made.

* * *"

2. Section 246 of the Immigration and Nationality Act, 8 U. S. C. A. §1256, provides in part:

"(a) * * * If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

* * *"

3. Section 203(a) of the Immigration and Nationality Act, 8 U. S. C. A. §1153(a), provided in part on November 12, 1958:

> "SEC. 203. (a) Immigrant visas to quota immigrants shall be allotted in each fiscal year as follows:
>
> (1) The first 50 per centum of the quota of each quota area for such year, plus any portion of such quota not required for the issuance of immigrant visas to the classes specified in paragraphs (2) and (3), shall be made available for the issuance of immigrant visas (A) to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States, and (B) to qualified quota immigrants who are the spouse or children of any immigrant described in clause (A) if accompanying or following to join him.
>
> * * *"

ARGUMENT.

I.

The Special Inquiry Officer Did Not Err in Refusing to Allow Petitioner to Challenge, During Her Deportation Hearing, the Determination Rescinding Her Adjustment of Status.

At her deportation hearing petitioner sought to present evidence tending to show that the determination rescinding her adjustment of status was in error [I-R. 74]. An objection by the trial attorney to this line of questions was sustained by the special inquiry officer; who ruled that he had no authority to go behind the decision made in the rescission proceedings, originally by the District Director, and on appeal by the Regional Commissioner [I-R. 74; see also decision of special inquiry officer at I-R. 45].

Respondent submits that this ruling of the special inquiry officer was correct. Detailed regulations of the Attorney General govern the procedure for rescission of adjustment of status [See 8 C. F. R. Part 246]. When petitioner's status as a permanent resident was rescinded, the power to do so resided in the district director with a right of appeal to the regional commissioner [See, former 8 C. F. R. 246.11, *et seq.*, 22 F. R. 9801, as amended by 23 F. R. 9124]. At that time,[3]

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[3]Effective November 5, 1962 the procedure for rescission of adjustment of status was revised, so that rescission is now adjudicated by a special inquiry officer with a right of appeal to the Board of Immigration Appeals [See, 8 C. F. R. 246.1, *et seq.*, 27 F. R. 10789-10790; see also 8 C. F. R. 3.1 (b) (8), 27 F. R. 10789]. However, this amendment should in no way affect rescissions which had become final prior to November 5, 1962 [Cf. *Antonio Rodriguez Silva v. Harlan B. Carter,* ..... F. 2d. ..... (9th Cir. No. 18,560, Dec. 30, 1963)—not yet reported; see page 11 of slip opinion].

no authority was given to special inquiry officers to pass upon rescission; and where the Attorney General has by regulation specifically delegated certain authority to particular officers, that authority may not be exercised by other officers, even though the latter may have general authority with respect to immigration matters [*Cf. Matter of DeG— et al.,* 8 I & N Dec. 325, 334 (Atty. Gen. Dec. 14, 1959); see also, *Matter of A—,* 6 I & N Dec. 242, 244 (Bd. Imm. App. July 26, 1955)]. *A fortiori,* the special inquiry officer presiding at petitioner's deportation hearing would have no authority to *set aside* a determination made by officers of the Immigration and Naturalization Service who have been specifically authorized to make that determination.

II.

The Information Given Petitioner, That No Further Appeal Was Available, Was Not Erroneous; But in Any Event, It Was Not Prejudicial.

On May 16, 1962 the District Director sent a letter to petitioner reading in part as follows [I-R. 87]:

> "I refer to my order dated March 13, 1962 wherein I rescinded the status of permanent resident you acquired on November 12, 1958 and your subsequent appeal to this decision.
>
> "The Regional Commissioner has upheld my decision and dismissed your appeal. A copy of his order is attached. There is no further appeal available to you."

Petitioner contends that "The Immigration Service committed error when it informed petitioner that 'there is no further appeal available,' when she was entitled to judicial review" (Br. 3, 4). This contention is unsound. The word "appeal" as used by the District Di-

rector obviously referred to an administrative appeal; and as discussed in Part I, *supra*, petitioner's right of administrative appeal ended with the decision of the Regional Commissioner. The word "appeal" does not generally connote judicial review of administrative proceedings.

In any event, petitioner was in no way prejudiced by the statement of the District Director, since the right to court review is still available to her. As discussed under Jurisdiction, *supra*, this Court may have original jurisdiction to review the administrative determination rescinding petitioner's adjustment of status. However, if this Court is without jurisdiction, judicial review may be had in the district court [See, *Quintana v. Holland,* 154 F. Supp. 640 (E.D. Pa. 1957), reversed on other grounds 255 F. 2d 161 (3d Cir. 1958)].

III.

The Order Rescinding Petitioner's Adjustment of Status Is Supported by Sufficient Evidence.

Under Section 246(a) of the Immigration and Nationality Act rescission of adjustment of status is required if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status"; and the court in *Quintana v. Holland,* 255 F. 2d 161 (3d Cir. 1958) made the following comment concerning such language (p. 164):

> "* * * We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required. * * *"

Respondent submits that the order of rescission is supported by sufficient evidence, under the standard quoted above, or even under the standard of "reasonable, substantial, and probative evidence" applicable in deportation proceedings[4] [See, Section 242(b)(4), of the Immigration and Nationality Act, 8 U. S. C. A. §1252(b)(4)]. Even in deportation proceedings, a court will not, in determining whether substantial evidence exists, substitute its judgment for that of the immigration authorities [*Ocon v. Del Guercio,* 237 F. 2d 177, 181 (9th Cir. 1956); *United States v. Butterfield,*

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[4]Respondent does not, by this assertion, concede that "reasonable, substantial, and probative evidence" is required to support an order of rescission under Section 246(a); since Congress apparently contemplated that rescission would be a more informal proceeding than deportation. *In Matter of S—,* 9 I & N Dec. 548, 551 (Atty. Gen. Jan. 22, 1962), the Attorney General observed (p. 555, footnote 8):

> "* * * The rescission procedure apparently resulted from congressional recognition that a means more informal and expeditious than deportation was needed to correct mistakes made in granting permanent residence to nonimmigrant aliens through adjustment of status. Experience under preexamination had shown that such mistakes were more likely to occur where eligibility for permanent resident status was determined by government officers located in the United States who did not ordinarily have the first-hand information available to American consuls located in a prospective immigrant's native country. See S. Rept. No. 1515, 81st Cong., 2d Sess., p. 606 (1950). This view of rescission is borne out by the fact that section 246 in authorizing rescission does not provide the explicit and detailed procedural requirements laid down for deportation proceedings by section 242(b) of the Act (8 U.S.C. 1252(b)). At the same time Congress must have been aware that rescission by returning the alien to nonimmigrant status, in fact, established his deportability on the ground that he had overstayed the period of his admission. * * * I should note in passing that while Congress may have *permitted* the Attorney General to make use of more informal procedures in rescission, in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission. See 8 CFR 246.12(a) and (b)." [Emphasis of the Attorney General].

223 F. 2d 804, 810-811 (6th Cir. 1955); *Taranto v. Haff,* 88 F. 2d 85, 86 (9th Cir. 1937); *Alexander v. Butterfield,* 150 F. Supp. 75, 78 (E. D. Mich. 1957); *In re Cartellone,* 148 F. Supp. 676, 681 (N. D. Ohio 1957), affirmed *sub nom Cartellone v. Lehmann,* 255 F. 2d 101 (6th Cir. 1958), cert. den. 358 U. S. 867]; nor will a court weigh the evidence [*Lattig v. Pilliod,* 289 F. 2d 478 (7th Cir. 1961)].

When petitioner applied for adjustment of status on August 26, 1958 she claimed preference quota status by reason of the fact that she was a registered nurse [II-R. 34, see item 36]; a similar claim was made in the visa petition filed on her behalf [II-R. 36-37]; and petitioner was accorded a first preference status under Section 203(a) (1) (A) of the Immigration and Nationality Act based upon the claimed fact that she was a registered nurse.

At the time of petitioner's application for adjustment of status, she claimed to have been employed at the Government Hospital at Tel-Hashomer, Tel Aviv, Israel as a children's nurse from July, 1953 to April, 1958 [II-R. 32, see item 14]; and in support of her application submitted a letter dated July 7, 1958 purportedly signed by one "Yheskel Aharoni" as "Hospital Director". This letter, bearing the salutation "To whom it may concern", stated [II-R. 17]:

> "This is to certify that Miss Evelyn Smouha has been a registered nurse, employed by this hospital, children's ward, since 1953, until April, 1958.
> Her work has been diligent and satisfactory throughout her employment."

However, on June 14, 1961, I. Hahari, Head of the Personnel Department, Tel-Hashomer Government Hospital, Israel, executed an affidavit before the American Consul at Tel Aviv, Israel, wherein he stated [II-R. 18]:

> "I, I. Hadari, Head of the Personnel Department of Tel Hashomer Government Hospital in the State of Israel do hereby certify that I have searched the employment records of this hospital and have found no record of employment of a nurse by the name of Miss Evelin Samahu (or Smouha) nor has there ever been a Hospital Director by the name of Yheskel Aharoni at this institution.
>
> Further, the stationery on which the statement of Mr. Aharoni is made is not, and has never been, the official stationery, in that there is no official letter-head thereon; however, it appears that the stamp of the hospital on the paper is genuine."

Upon being questioned on October 3, 1961 petitioner admitted having presented in support of her application for adjustment of status the letter purported signed by "Yheskel Aharoni" [II-R. 23]. Petitioner also admitted that she "was never employed directly by this hospital" [II-R. 23]; although she claimed that she was employed by the Government of Israel at the Tel Hashomer Camp [II-R. 23]. In addition, petitioner admitted that she "was primarily a seamstress" at this military camp [II-R. 24]; although she claimed that she "would some times go to the hospital and work for Mrs. Regina Jacob who was a trained nurse and she would show me how to care for the children and other functions of the hospital" [II-R. 23].

Thus, petitioner's own admissions, coupled with the affidavit of I. Harari quoted above [II-R. 18] show that the letter dated July 7, 1958 [II-R. 17] submitted by petitioner in support of her application for adjustment of status, was false in several respects. It was not necessary, however, to establish fraud on petitioner's part, in order to justify rescission of her adjustment of status. It was only necessary for it to "appear to the satisfaction of the Attorney General" that petitioner was not in fact a registered nurse as she claimed, and thus was not entitled to the first preference quota status accorded her. Respondent submits that this test has been met, by "reasonable, substantial, and probative evidence", if such is required.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that this Court should render a decision in favor of the respondent and against the petitioner, upholding the order rescinding petitioner's adjustment of status and upholding the order of deportation outstanding against her, if the jurisdiction of this Court to do so is found to exist; but if jurisdiction of this Court is found not to exist, dismissing the Petition For Review of Deportation Order filed herein.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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